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No. 88-542

In The

Supreme Court of the United States

October Term, 1988

EDWARD W. JACKSON,

Petitioner,

v.

STATE OF MAINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can sovereign immunity be asserted as a defense to a claim brought in state court under the Vocational Rehabilitation Act of 1973 with respect to a violation that occurred prior to the effective date of the 1986 Rehabilitation Act Amendments?

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STATEMENT OF THE CASE

This case began as an action for judicial review of the State's denial of Petitioner's application to take a school bus driver's examination because of his condition as an insulin dependent diabetic. Petitioner's Amended Complaint alleged, *inter alia*, that the State had discriminated against him in violation of § 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1988), which prohibits discrimination against the handicapped by federal grant recipients.

The Maine Superior Court found that the State had violated the Rehabilitation Act. It awarded Petitioner injunctive relief and attorney's fees. It also awarded Petitioner damages under the "just compensation" clause of the Maine Constitution but indicated that the Rehabilitation Act did not abrogate the State's sovereign immunity.

The Maine Supreme Judicial Court affirmed the Superior Court's finding of liability and its award of attorney's fees and concluded "that the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under section 504 of the Rehabilitation Act." *Jackson v. State*, 544 A.2d 291, 298 (Me. 1988), reprinted in the Appendix to the Petition for Certiorari (Pet. 1a-42a). The Supreme Judicial Court noted that the Rehabilitation Act

> was amended in 1986 to allow suits against states in federal court for violations of the Rehabilitation Act. 42 U.S.C. 2000d-7(a)(1) (Supp. 1988). It is by no means clear that the amendment abrogates sovereign immunity in state courts. In any event, the amendment

applies only to Rehabilitation Act violations occurring after October 21, 1986, and thus has no effect on the instant case. 42 U.S.C. § 2000d-7(b) (Supp. 1988).

(Pet. 40a).

REASONS FOR DENYING THE WRIT

I. IN VIEW OF THE 1986 AMENDMENTS TO THE REHABILITATION ACT, THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner argues that there is no sovereign immunity in either federal or state court protecting the State of Maine from a damages award under the Rehabilitation Act. Effective October 21, 1986, the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, codified at 42 U.S.C. § 2000d-7 (Supp. 1988), abrogated such immunity, at least in federal court. Regardless of the scope of the Amendments' prospective abrogation of sovereign immunity, it is clear from their terms that the Amendments are not retroactive in any respect. *See* 42 U.S.C. § 2000d-7(b). Consequently, the Amendments have no effect on the instant case. The Maine Supreme Judicial Court so held, finding no violations of the Rehabilitation Act by Respondent after October 21, 1986. (Pet. 40a).

The finding that there were no violations of the Rehabilitation Act by Respondent after October 21, 1986 is not an issue demanding the attention of this Court. The Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981) (improvident grant of

cross-petition that presented primarily a question of fact, "which does not merit Court review"); *Rudolph v. United States*, 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918).

The remaining question is whether, prior to the 1986 Amendments, the Rehabilitation Act abrogated the states' sovereign immunity in state court. While this issue is dispositive of Petitioner's claim for damages in this case, it has been rendered largely academic as a precedential matter by the 1986 Amendments. All future claims of discrimination under the Rehabilitation Act, as well as all past claims arising since October 21, 1986, will be governed by the 1986 Amendments, and Petitioner has offered no good reason why this Court should explore the issue of sovereign immunity under prior law.

As the opinion of the Maine Supreme Judicial Court suggests, there may be an issue whether the 1986 Amendments only abrogated the states' immunity under the Eleventh Amendment or whether they also abrogated sovereign immunity in the state courts as well. That issue should be decided in a case involving violations that occurred after October 21, 1986, when the 1986 Amendments became applicable.

II. IN ANY CASE, THE FEDERAL QUESTIONS RAISED BY PETITIONER DO NOT JUSTIFY A GRANT OF CERTIORARI.

Even assuming that the status of sovereign immunity under the pre-1986 version of the Rehabilitation Act presents a sufficiently live issue for this Court to consider,

close examination of Petitioner's claims reveals insufficient reason for this Court to grant certiorari.

Petitioner alleges that this Court should grant the writ because the Maine Supreme Judicial Court's decision conflicts with: (1) this Court's Eleventh Amendment decisions, (2) this Court's Supremacy Clause decisions, (3) this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and (4) the legislative history of the Rehabilitation Act. Each of Petitioner's allegations is wrong. Because it is more logical to begin with the legislative history, we respond to these contentions in reverse order.

A. There Is No Conflict With The Rehabilitation Act's Legislative History.

Implicit in all Petitioner's allegations is Petitioner's erroneous assumption that the pre-1986 version of the Rehabilitation Act abrogated the states' sovereign immunity. There is absolutely no indication, however, in the original Rehabilitation Act or its contemporaneous legislative history that Congress intended to override the traditional sovereign immunity of the states.[1] Congressional intent to deprive states of their sovereign immunity will not be inferred from the general language of a statute that is silent on the issue of sovereign immunity. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). The 1973 Rehabilitation

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[1] Indeed, Congress never explicitly created a private cause of action in the Rehabilitation Act. *See, e.g., Ciampa v. Massachusetts Rehabilitation Commission*, 718 F.2d 1, 3 (1st Cir. 1983) (noting absence of explicit private cause of action).

Act provided for attorney's fees, but it is devoid of any language making states liable for damages. Accordingly, it did not abrogate the states' traditional immunity from damage claims.

In arguing that the original Rehabilitation Act abrogated the states' common law sovereign immunity, Petitioner relies upon the words of Senator Alan Cranston during the passage of the Civil Rights Remedies Equalization Act of 1986 (which enacted 42 U.S.C. § 2000d-7), 132 Cong. Rec. § 15105-6 (daily ed. Oct. 3, 1986). Senator Cranston uttered those statements thirteen years after the passage of the Rehabilitation Act, and it is well settled that such post-enactment comments by legislators are not legally cognizable legislative history. *United States v. Clark*, 445 U.S. 23, 33 n. 9 (1980); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968), *quoting Rainwater v. United States*, 356 U.S. 590, 593 (1958). Ultimately, Petitioner's theory that, by enacting the original Rehabilitation Act, Congress decided to abrogate state sovereign immunity for federal claims in state court while declining to allow such claims in federal court (as made clear by this Court in *Atascadero*), is without any supporting authority.

Thus, while it is plain that the 1986 Rehabilitation Act Amendments, 42 U.S.C. § 2000d-7, Pub. L. No. 99-506, abrogated Eleventh Amendment immunity for Rehabilitation Act violations after October 21, 1986, it is equally plain that sovereign immunity was fully available prior to that date, the only relevant period for this case.

B. There Is No Conflict With The *Atascadero* Decision.

In arguing that the Rehabilitation Act was designed to abrogate sovereign immunity, Petitioner relies on a footnote in *Atascadero State Hospital v. Scanlon*, 473 U.S. at 240 n. 2 (1985). That footnote, read in context, does not constitute a ruling that Congress originally intended to override sovereign immunity for damages under the Rehabilitation Act in cases brought in state court. Instead, responding to the dissent's suggestion that the decision exempted state agencies from any obligation to comply with the law, it suggests only that claims for injunctive relief under the Rehabilitation Act could be pursued in state court.[2]

Atascadero's recognition of Eleventh Amendment immunity under the original Rehabilitation Act, *see* 473 U.S. at 244-47, belies Petitioner's contention that the Act abrogated states' immunity from claims in state court. It would be highly illogical for Congress to abrogate immunity from federal claims in state court while declining to allow such claims in federal court. As noted, the Act and its contemporaneous history are devoid of any evidence

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[2] The plaintiff in *Atascadero* had sought injunctive relief as well as damages, yet the majority decision held that the entire lawsuit was barred by the Eleventh Amendment. In part, this was because the only defendants sued in *Atascadero* were a state hospital and a state agency. The plaintiff could presumably have brought a suit in federal court for injunctive relief if he had sued the relevant state officials rather than naming the state or its agencies as defendants. *Ex Parte Young*, 209 U.S. 123 (1908).

of such illogical Congressional intent. *See* Point II-A, *supra*.

C. There Is No Conflict With Supremacy Clause Decisions.

Petitioner argues that by recognizing Maine's sovereign immunity from an award of damages under the Rehabilitation Act, the Maine Supreme Judicial Court has run afoul of the Supremacy Clause. The argument assumes, of course, that there was an unequivocal waiver of the states' sovereign immunity in the pre-1986 version of the Rehabilitation Act. No such waiver applies to this case. *See* Points II-A and II-B, *supra*.

D. There Is No Conflict With Eleventh Amendment Decisions.

In an attenuated argument, Petitioner claims a necessity for review of *Jackson* because of its reliance upon *Thiboutot v. State of Maine*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds sub nom. Maine v. Thiboutot*, 448 U.S. 1 (1980). *See* (Pet. 37a-42a). In *Thiboutot*, the Maine Supreme Judicial Court held that in the absence of explicit waiver the State may constitutionally interpose its sovereign immunity in state court as a bar to a retroactive award of damages under 42 U.S.C. § 1983. 405 A.2d at 237.

Petitioner, in effect, urges the Court to use this case to revisit the Maine Supreme Judicial Court's *Thiboutot* decision and find it inconsistent with this Court's Eleventh Amendment decisions. Petitioner ignores this Court's recognition that "no Eleventh Amendment question is present, of course, where an action is brought in a

state court." *Maine v. Thiboutot*, 448 U.S. at 9 n. 7. Petitioner also ignores that the State court's *Thiboutot* decision is in fact *consistent* with this Court's Eleventh Amendment decisions refusing to impute to Congress an abrogation of sovereign immunity. *See, e.g., Atascadero*, 473 U.S. at 243; *Quern v. Jordan*, 440 U.S. 332, 341 (1979); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973).[3]

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[3] Petitioner's suggestion that this case is related to other cases presently on review (Pet., p. 13 n. 8) does not support the granting of certiorari. The other cases cited by Petitioner involve interpretation of 42 U.S.C. § 1983. This case involves interpretation of the pre-1986 version of the Rehabilitation Act.

CONCLUSION

For the foregoing reasons, the Respondent State of Maine respectfully requests that the Petition for Writ of Certiorari to the Supreme Judicial Court of Maine be denied.

Respectfully submitted,

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